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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1998

MICHAEL BOWERSOX,
Superintendent, Potosi Correctional Center
Petitioner,

v.

HEATH ALLEN WILKINS,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

Questions Presented for Review

I.

Whether the trial court accepting a waiver of counsel in a criminal proceeding must examine the totality of the circumstances to determine if the waiver is knowingly and intelligently made.

II.

Whether the trial court accepting a guilty plea must examine the totality of the circumstances to determine if the plea is knowingly and intelligently made.

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MICHAEL BOWERSOX,
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On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

Petitioner, Superintendent Bowersox, prays the Court for its order granting a writ of certiorari to review the judgment of the court below affirming the grant of Respondent Wilkins' application for writ of habeas corpus.

Opinions Below

The June 8, 1998 Panel Opinion of the United States Court of Appeals for the Eighth Circuit, for which petitioner seeks this Court's review, is reported at 145 F.3d 1006 (8th Cir. 1998), and published in the Appendix at App. 1. The May 15, 1996 Order of the District Court granting the petition for writ of habeas

corpus is reported at 933 F.Supp. 1496 (W.D. Mo. 1996) and published at App. 26. The District Court's May 16, 1995 Order granting the petition for writ of habeas corpus, before remand by the court below (App. 110), is reported at 886 F.Supp. 1503 (W.D. Mo. 1995) and published at App. 113.

Jurisdictional Statement

The Opinion of the United States Court of Appeals for the Eighth Circuit was issued on June 8, 1998 (App. 1). The court below denied the petition for rehearing with suggestions for rehearing *en banc* on July 13, 1998 (App. 103). Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

The sixth amendment to the Constitution of the United States provides, in pertinent part, that: "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense."

Section 1 of the fourteenth amendment to the Constitution of the United States provides, in pertinent part, that: "No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

Subsection (a) of 28 U.S.C. § 2254 provides that "[t]he Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the

ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

Statement of the Case

On July 27, 1985, Wilkins stabbed to death a twenty-six-year-old mother and convenience store co-owner during the course of a robbery (App. 176, reported at State v. Wilkins, 736 S.W.2d 409, 410 (Mo. banc 1987), *cert. granted in part,* Wilkins v. Missouri, 487 U.S. 1233 (1988), *aff'd sub nom.* Stanford v. Kentucky, 492 U.S. 361 (1989)).

Respondent was arrested for Nancy Allen's murder on August 10, 1985 (App. 180). One month before his seventeenth birthday, the juvenile court certified respondent to stand trial as an adult under Mo. Rev. Stat. § 211.071 (1986) (State's Exh. B[1], pp. 4-5). On October 17, 1985, respondent was arraigned on charges of Murder in the First Degree, Unlawful Use of a Weapon, and Armed Criminal Action (App. 181). Respondent's court-appointed counsel entered pleas of not guilty and not guilty by reason of mental disease or defect excluding responsibility (App. 181), and filed a motion for mental examination (App. 181). The trial court entered the pleas and ordered that the Department of Mental Health examine respondent (App. 181).

On November 27, 1985, Dr. Steven A. Mandracchia, Ph.D., a clinical psychologist, conducted a clinical examination, personal interview, psychological testing, and mental status examination of respondent (App. 226). Dr. Mandracchia also relied upon the following information: (1) "Referral data from the Seventh Judicial Circuit Court, Clay County, Missouri";

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[1]Citation to exhibits are to those exhibits before the district court.

(2) "Clay County Sheriff's Department Investigation Report and related reports . . . pertaining to the alleged offenses"; (3) "Evaluation and treatment records from: Crittenton Center, Kansas City, Missouri; Tri-County Community Mental Health Center, North Kansas City, Missouri; Butterfield Youth Services, Inc., Marshall, Missouri; and, Western Missouri Mental Health Center, Kansas City, Missouri"; (4) "Evaluation and Progress Reports from the State of Missouri, Division of Family Services and the Clay County, Missouri Juvenile Court"; and (5) "Psychiatric Social Work Report completed at Western Missouri Mental Health Center specifically for this evaluation." (State's Exh. M-1, p. 1).

Dr. Mandracchia concluded that "the results of this examination indicate that the defendant is an individual of average intellectual capacity who demonstrates no gross deficits in terms of his overall mental status and no symptoms of mental disease or defect within the meaning of Chapter 552, R.S.Mo." (State's Exh. M-1, p. 4). Dr. Mandracchia reported that respondent "possesses sufficient capacity to understand the proceedings against him, meaningfully assist legal counsel, and cooperate with the Court in his own best interest." (State's Exh. M-1, pp. 4-5). His opinion did not change after learning that respondent intended to discharge his attorney, plead guilty, and seek a sentence of death (App. 229).

Respondent's experts, William Logan, M.D. and Melvin Berg, Ph.D., also evaluated his competency (App. 234). Dr. Logan interviewed respondent for five hours, focusing on respondent's history, current mental state, and state of mind at the time of the offense (App. 234). Background material reviewed by Dr. Logan included the following: (1) evaluations of the Tri-County

Mental Health Center and Western Missouri Mental Health Center during August and September 1979; (2) records from the Butterfield Youth Services including the admissions summary, reports to the juvenile court, treatment reviews, progress reports, psychological testing, school records, psychiatric evaluations, and discharge summary covering the period from 2/1/80 until 5/20/83; (3) reports from the Crittenton Center in Kansas City, Missouri, including the discharge summary, psychiatric evaluation, psychological testing, and school records covering a period from 5/28/83 until 11/17/83; (4) the psychiatric evaluation of the Western Missouri Mental Health Center dated 12/16/85; and (5) investigation reports on the current offense (Wilkins' Exh. 14-A, p. 2).

On the issue of competence to stand trial, Dr. Logan reported:

> The patient appears to have an accurate understanding of the charges against him, the potential penalty if convicted, possible pleas, and the role of the various officers and procedures of the court. Likewise he has sufficient memory and verbal ability to relate the details of his case to his attorney and assist him in preparing an adequate defense.
>
> While the patient's cognitive capacity is intact, his actions in the case are governed more by his emotions. Prominent in this regard is his stated wish to die and determination to plead guilty to speedily effect this end. Since this is the case, he does not see his attorney as

working in his own best interest. He is still insistent on a personal freedom, namely a freedom to die. He explains he fears torture more than death. He continues, death is no loss to him and that he prefers death to being locked up. He maintains he will not go to prison or a mental institution. He has thought of ending his life as he has "nothing to look out on." He believes he is a liability to his girl friend, his only connection, and his death would actually aid her in moving on with her own life. He labors under the assumption she is charged with a lesser crime and will receive a shorter penalty than himself. He expresses guilt at his own destructiveness and that he has hurt his girl friend, the victim, the victim's family, and his friends. He has only limited appreciation of the appeal process or society's interest in his fate viewing this as only another intrusion and limitation of his own freedom.

In conclusion, while the patient has an adequate factual understanding of his situation and the ability to cooperate with his attorney, emotional issues may prevent him from acting in his own best interests. The weighing of these two factors, the cognitive versus the emotional, is the essence of the decision before the court.

(Wilkins' Exh. 14-A, p. 14).

Dr. Berg conducted psychological testing on March 22, 1986 (App. 234). Dr. Berg's "Psychological Test Report" included the following regarding "legal implications":

> Despite the massive impairments in this youngster's development which have contributed toward his inadequate impulse controls, vulnerability to muddled thought, intense rage, and experience of others as not being real, he cannot be regarded as suffering from a psychotic condition which grossly impairs his attunement with reality. Certainly it is possible that in the heat of intense feeling states his capacity to think clearly, control his impulses, and evaluate reality can become temporarily weakened.
>
> With regard to his ability to aid in his own defense, he possesses adequate cognitive skills to be able to collaborate with an attorney and understand the legal circumstances facing him. His reported disinterest in waging a legal defense may result from his hopeless view of his life which already feels barren and worthless, so the prospect of living in prison without the stimuli to distract him from his inner torment may seem unbearable.

(Wilkins' Exh. 15-A, pp. 6-7).

On April 16, 1986, the trial court found respondent competent to stand trial (App. 257).[2] Respondent then moved to proceed pro se (App. 257). The court addressed that motion with respondent:

> The Court: Everyone has a right to represent themselves. Do you understand the constitution also gives you a right to have an attorney?
>
> Defendant: Yes, I do.
>
> The Court: And the court has supplied that for you by appointing the public defender office in this case.
>
> Defendant: That is correct.
>
> The Court: And there are many, of course, you are not skilled in the law. And what is your age?
>
> Defendant: Seventeen, your honor.
>
> The Court: And the extent of your education?

---

[2]Respondent conceded the issue of competence to waive counsel and plead guilty when he abandoned his claim before the district court that he was incompetent to proceed at the time of his guilty plea and sentencing hearing (Wilkins' Revised Motion To Dismiss Certain Claims In The Amended Petition -- Joint Appendix (J.A.) before the court below, pp. 1137-1138; Order of the district court granting motion to dismiss certain claims -- App. 104).

Defendant: Ninth grade, your honor.

The Court: So, you are really not familiar at all with legal proceedings, are you?

Defendant: That is correct.

The Court: During the course of making decisions you would not have the background of legal knowledge or experience that a lawyer would possess, isn't that correct?

Defendant: Yes, your honor. I'm not, I don't, okay, that is correct.

* * * * *

The Court: Getting back to what I was saying before, you do understand, Mr. Wilkins, that you have a right to hire your own attorney?

Defendant: Yes, your honor, I do.

The Court: And that would be an attorney of your own choice and selection.

And, again, since you have been unable to employ one the court has appointed one for you. I presume that you are still in a position not to employ your own attorney, is that correct?

Defendant: That is correct.

The Court: But, you do understand that an attorney, of course you also understand that you're entitled to have a trial by jury in this case?

Defendant: Yes, your honor.

* * * * *

Mr. Duchardt [defense counsel]: Heath, have I explained to you basically the types of things that I would do if I were your attorney in attempting to try this case to attempt to reach the type of result that Judge McFarland was talking about earlier, in other words trying the case in an attempt to win it, for lack of a better term. Did I explain all of that to you?

Defendant: Yes.

Mr. Duchardt: And is it a fair statement that you said that's just not what you want a lawyer to do for you?

Defendant: Yes, that's unacceptable, yes.

The Court: How long have you thought about this decision to discharge Mr. Duchardt as your attorney and to conduct your own defense?

Defendant: Since----

Mr. Duchardt: January.

Defendant: ----January. And the last, my original court hearing when my evaluation from Tri-County when I came in here, I was----

Mr. Duchardt: Western Missouri.

Defendant: ----Yes, Western Missouri, I mean.

The Court: I must be rather candid with you, you understand that if you, if you do, as I understand what you've indicated here that you want to do, you might very well enter a plea of guilty and ask for the death penalty.

Now, do you understand fully that if you do that, that decision then would be up to the court as to whether or not you'd receive the death penalty or not?

* * * * *

The Court: Mr. Duchardt, have you talked with Mr. Wilkins at length about this situation?

Defendant: Yes, sir.

Mr. Duchardt: How many times would you say, Heath, that you and I have talked about this, three or four times anyway over at the jail.

And a couple of those conversations were at least two hours long, I think.

Judge, I've tried to describe for Mr. Wilkins all of the different possibilities and all of the options that----

Defendant: Yes, sir, quite explicit.

Mr. Duchardt: ----are, his words are well taken, quite explicit. And I've attempted to go through every potential option that I can see in our ability to defend this case and attempt to present a valid defense on his behalf.

And also I've attempted to describe for him the scenario should he wish to go ahead and proceed as he is. And that's what got us to our specific conversations about the fact that, at least in my opinion, a lawyer would be duty bound to do things just the opposite of what Mr. Wilkins would wish be done should he continue on this path of trying to seek the maximum punishment for himself.

Defendant: Yeah, I'd like to make your honor aware that this isn't, you know, just a spur of the moment idea or anything along that line.

* * * * *

(App. 258-259, 263, 268-271).

A week later respondent renewed his desire to proceed pro se. The court again discussed with

respondent his right to have counsel appointed, explained the range of punishment on the charge of first-degree murder, and explained the bifurcated nature of a first-degree murder proceeding (App. 282-284). The trial court then advised respondent of the following:

> The Court: And legal research. And they [lawyers] could help you, of course, in the conduct of your trial and at all other pretrial proceedings.
>
> And in regard to the conduct of the trial if you had one, of course, they could obviously do a better job than you in conducting the voir dire examination of the jury panel, in selecting the jury, in making opening statement, in examining and cross-examining all witnesses, in making objections and preserving the record for appeal, making all proper motions, in the preparation of instructions that are submitted to the court for submission to the jury, all arguments to the jury and to the court.
>
> And in the event you are found guilty they would assist you in your right of appeal. And the first step of that would be, probably, a motion for new trial.
>
> Now, you don't have any legal experience. You don't have any legal training. And the court encourages you to change your mind and to accept the representation, that is the continued representation of the Public Defender

Office. And you do understand all of that?

Defendant: I understand, your Honor.

* * * * *

(App. 284). The court also discussed with respondent what is required to accept a guilty plea, including a factual basis for the plea, and whether there exists witnesses, facts, circumstances, or evidence that would exonerate him or that would cast a reasonable doubt about his guilt. (App. 288-289).

Later that afternoon the court granted the public defender's office leave to withdraw, and ordered the public defender to remain available to consult with respondent throughout the proceeding (App. 297). Respondent asked to plead guilty as charged (App. 299). The court did not automatically accept respondent's pleas. Instead, the court explained the rights that respondent would be waiving and told respondent that the court would permit him to withdraw his guilty pleas until the time that sentence is pronounced (App. 299-301). The court also urged respondent to reconsider his decision to proceed without counsel (App. 301-302), and continued the matter (App. 304).

On May 9, 1986, respondent renewed his pleas of guilty, stating they were not coerced, and then described the circumstances of the offenses (App. 314-320, 330-336). The court reminded respondent of the rights he was waiving by pleading guilty and foregoing a trial -- e.g., to have counsel assist him throughout those proceedings, the presumption of innocence, to confront witnesses, to remain silent, and to appeal

(App. 338-340). The court accepted respondent's guilty plea, finding a factual basis and that "defendant's plea of guilty is made voluntarily and intelligently and with full understanding of the charge and consequences of the plea and with understanding of his rights attending a jury trial and the effect of a plea of guilty on those rights." (App. 351).

At the sentencing hearing on June 27, 1986, the court again discussed with respondent the role a lawyer could play in the penalty phase (States' Exh. A-2, pp. 179-182). The State presented its evidence; respondent presented no mitigating evidence (State's Exh. A-2, pp. 194-289). The court concluded that respondent's decision to seek the death penalty "was made rationally and after due thought and deliberation." (State's Exh. A-2, p. 299). After finding that "[t]he murder in the first degree was committed while the defendant was engaged in the perpetration of the felony of robbery" and that "[t]he murder in the first degree involved depravity of mind and that as a result thereof it was outrageously or wantonly vile, horrible, or inhuman," (State's Exh. A-2, p. 300), the court set death as respondent's sentence for first-degree murder (State's Exh. A-2. pp. 300-301).

On mandatory review before the Missouri Supreme Court, Mo. Rev. Stat. § 565.035 (1986), respondent again sought to proceed pro se (App. 177). But the court appointed counsel, received briefs, and heard argument. On September 15, 1987, that court affirmed respondent's sentence and conviction (App. 176). This Court granted certiorari and decided that the Eighth Amendment prohibition against cruel and unusual punishment did not preclude the exercise of capital punishment on an individual who was age

sixteen or seventeen at the time of the offense. Wilkins v. Missouri, 492 U.S. 361 (1989).

Pursuant to Mo. S.Ct. R. 24.035, respondent filed a motion for postconviction relief (State's Exh. G, p. 1). Following respondent's amendment to the motion, the circuit court held an evidentiary hearing (State's Exh. F). Circuit Judge McFarland, who had presided over respondent's pretrial, plea, and sentencing proceedings, denied relief (State's Exh. G, pp. 84-113). The Missouri Supreme Court affirmed that denial (App. 141, reported at Wilkins v. State, 802 S.W.2d 491, 504 (Mo. banc), cert. denied, 502 U.S. 841 (1991)).

On May 8, 1992, respondent filed his petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Western District of Missouri (J.A. 13). The district court granted the writ of habeas corpus on May 16, 1995 (App. 114). The State appealed, and the United States Court of Appeals for the Eighth Circuit remanded to the district court for resolution of all issues raised in the first amended petition (App. 110). After vacating its May 16, 1995 order and dismissing a number of grounds upon respondent's motion (App. 104), the district court granted the writ on May 15, 1996 (App. 26). Petitioner again appealed. The court below affirmed the district court's judgment on June 8, 1998 (App. 1). The State's petition for rehearing with suggestions for rehearing *en banc* was denied on July 13, 1998 (App. 103).

Argument

I. The court below decided a question of constitutional law in a way that conflicts with this Court's decision in Faretta v. California, 422 U.S. 806 (1975) and decisions of other United States Courts of Appeals, in that the court below held that the determination of whether a waiver of counsel is valid requires the procedural exactitude delineated in Von Moltke v. Gillies, 332 U.S. 708 (1948) (plurality), rather than examining the totality of the circumstances.

The Court should resolve the conflict perpetuating in the lower courts concerning the knowing and intelligent waiver of counsel. Some courts look to the totality of the circumstances to determine if the waiver was knowing and intelligent. Others, as exemplified by the present case, look to see if a checklist of issues were discussed on the record. Review in the present case would allow the Court to resolve the conflict and inform trial courts to review the totality of the circumstances in deciding whether a waiver is knowing and intelligent.

To affirm the district court's grant of habeas corpus relief, the court below applied a standard for waiver of counsel announced in this Court's plurality decision in Von Moltke v. Gillies, 332 U.S. 708 (1948), notwithstanding this Court's more recent description of the standards for a valid waiver in Faretta v. California, 422 U.S. 806, 835 (1975) and Patterson v. Illinois, 487 U.S. 285, 298 (1988). In holding that respondent's waiver of counsel was not valid, the court below stated:

The Supreme Court has explained the requirements for a valid waiver of counsel.

> To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.
>
> Von Moltke v. Gillies, 332 U.S. 708, 724, 68 S.Ct. 316, 92 L.Ed. 309 (1948) (plurality). To validly waive counsel, a defendant must actually understand all of the relevant considerations; thorough advise from the court alone is not sufficient. . . .

(App. 12).

In relying upon Von Moltke as providing a mechanical formula to determine a valid waiver of counsel, the court below joined the Third and Tenth Circuits in failing to recognize or apply this Court's more recent discussions of the basic requirement that a waiver of counsel be made knowingly and intelligently:

> Although a defendant need not himself have the skill and experience of a lawyer

> in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open." Adams v. United States ex rel. McCann, 317 U.S. [264, 279, 63 S.Ct. 236, 242, 87 L.Ed.2d 268 (1942)].
>
> * * * * *

Faretta, 422 U.S. at 835. That is, the scope of the right to counsel has been defined

> by a pragmatic assessment of the usefulness of counsel to the accused at the particular proceeding, and the dangers to the accused of proceeding without counsel. An accused's waiver of his right to counsel is "knowing" when he is made aware of these basic facts.

Patterson, 487 U.S. at 298.

In stark contrast with the court below's reliance on Von Moltke, a review of the totality of the circumstances reveals respondent's waiver was knowing and intelligent. Having found respondent competent to stand trial (App. 257), and in light of respondent's insistent refusal to accept counsel's assistance[3], the court's numerous warnings of the perils

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[3]App. 257-258, 261, 268, 277, 285-286, 289-290, 297-298, 316, 318-320, 341.

inherent with self-representation[4], explanation of the range of punishment on the charge of first-degree murder, the nature of the bifurcated proceedings in a murder trial, and matters relating to the acceptance of a guilty plea[5], not allowing respondent to represent himself would have forced counsel upon an unwilling defendant. See Faretta, 422 U.S. at 820.[6] Undoubtedly the trial court protected respondent's right to counsel with knowledge of the perils of self-representation, describing what counsel could do in representing respondent, and by attempting to persuade him that self-representation was not only a bad idea but of the dire consequences under the circumstances. As illustrated by the present case, the choice between the conflicting standards can be outcome determinative.

The First, Second, Fourth, Fifth, Sixth, Seventh, Ninth, Eleventh, and District of Columbia Circuits, in

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[4]App. 259, 265-267, 272, 281, 283-284, 289, 297, 310-311, 314-316, 318.

[5]App. 263-264, 282-283, 287-289, 299-302, 307-309, 317, 321-324, 327-328, 338-341.

[6]According to the court below, "the state court made no findings of fact relevant to the waiver of counsel." (App. 13). This conclusion ignores the principle that when the trial court holds a hearing and reaches the merits of a federal constitutional claim, the federal court must assume that the state court found the facts necessary to support its decision unless there is some indication that the state court applied an incorrect legal standard in resolving the claim. LaVallee v. Delle Rose, 410 U.S. 690, 692-695 (1973).

post-Faretta decisions, have not applied the Von Moltke inquiry.[7]

Some federal courts renounce the Von Moltke approach. For example, in Campbell, 874 F.2d at 845, the First Circuit expressly rejected the argument that Von Moltke and Johnson v. Zerbst, 304 U.S. 458, 465 (1938) required that "'the district court must issue a particular warning or make specific findings of fact before it allows the defendant to proceed pro se.'" (quoting United States v. Hafen, 726 F.2d 21, 25 (1st Cir.), cert. denied, 466 U.S. 962 (1984)); see also Spanbauer v. Burke, 374 F.2d 67, 72-74 (7th Cir. 1966), cert. denied, 389 U.S. 861 (1967) (tracing the application of Von Moltke in the federal courts before Faretta, and concluding that in almost every instance the courts have applied the substance of the Von Moltke guidelines rather than an exacting formula). Some state supreme courts also have expressly decided not to apply Von Moltke literally. See, e.g.,

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[7]United States v. Campbell, 874 F.2d 838, 845-846 (1st Cir. 1989); Torres v. United States, 140 F.3d 392, 401 (2nd Cir.), pet. for cert. filed (9/8/98); United States v. Gallop, 838 F.2d 105, 110 (4th Cir.), cert. denied, 487 U.S. 1211 (1988); Richardson v. Lucas, 741 F.2d 753, 757 (5th Cir. 1984); United States v. McDowell, 814 F.2d 245, 249 (6th Cir.), cert. denied, 484 U.S. 980 (1987); United States v. Moya-Gomez, 860 F.2d 706, 732-733 (7th Cir. 1988), cert. denied, 492 U.S. 908 (1989); United States v. Ant, 882 F.2d 1389, 1394 (9th Cir. 1989); Fitzpatrick v. Wainwright, 800 F.2d 1057, 1065 (11th Cir. 1986); United States v. Brown, 823 F.2d 591, 599 (D.C. Cir. 1987); accord State v. Merino, 915 P.2d 672, 696-697 (Haw. 1996); State v. Van Sickle, 411 N.W.2d 665, 667 (S.D. 1987).

Wayne v. State, 495 S.E.2d 34, 38 (Ga. 1998); State v. Strain, 585 So.2d 540, 542 (La. 1991).

Four other circuit courts not applying Von Moltke have concluded that Faretta did not establish detailed guidelines concerning what tests or lines of inquiry a trial judge is required to conduct to determine whether the defendant's decision to waive counsel was knowing and intelligent. Gallop, 838 F.2d at 109; McDowell, 814 F.2d at 249; Moya-Gomez, 860 F.2d at 732; Fitzpatrick, 800 F.2d at 1065; cf. Brown, 823 F.2d at 599 ("Neither case law nor common sense supports the position that a trial court must advise a defendant of each and every difficulty he might encounter in a particular case."). The District of Columbia and Sixth Circuits, to facilitate review, have exercised their supervisory power pertaining to the record that district courts should make in determining the validity of a waiver of counsel in federal prosecutions. McDowell, 814 F.2d at 249-250; United States v. Bailey, 675 F.2d 1292, 1300 (D.C. Cir.), cert. denied, 459 U.S. 853 (1982).

The rationale behind these decisions is the problems inherent with a literal application of Von Moltke:

> The Von Moltke case suggests a standard of perfection. Applied literally, there could never be a competent waiver of the assistance of counsel inasmuch as few, if any, judges, and perhaps not even lawyers, could deliver an impromptu dissertation in every case covering all possible included offenses, the range of allowable punishments, all possible defenses to the charges and

> circumstances in mitigation thereof. We view the language of the Von Moltke opinion as directory to the trial courts, emphasizing the importance of careful inquiry before a waiver of the assistance of counsel is accepted. It does not require a hypothetical lecture on criminal law for the edification of the defendant. It is sufficient if basic rights appearing from the then record before the court are discussed. . . .

Arnold v. United States, 414 F.2d 1056, 1058 (9th Cir. 1969), cert. denied, 396 U.S. 1021 (1970) (internal citations omitted); accord LaPlante v. Wolff, 505 F.2d 780, 782 (8th Cir. 1974), cert. denied, 420 U.S. 995 (1975) (sharing the concern that the trial court, in order to acquire information as to possible defenses "may infringe on the accused's constitutional right against self-incrimination.").

Rejecting the course take by nine circuits, in this case the Eighth Circuit followed the Third and Tenth in invoking the rigid formula of Von Moltke. United States v. Welty, 674 F.2d 185, 188-189 (3rd Cir. 1982) (but disavowing the requirement of "a detailed listing of advice similar to that mandated for guilty plea proceedings conducted pursuant to Rule 11 of the Federal Rules of Criminal Procedure . . . ."); United States v. Taylor, 113 F.3d 1136, 1141 (10th Cir. 1997). At least two state supreme courts have also applied a literal interpretation of Von Moltke. Briscoe v. State, 606 A.2d 103, 108 (Del. 1992); State v. Crisafi, 608 A.2d 317, 324 (N.J. 1992). The courts holding that this Court in Von Moltke set forth the requirements for

determining the validity of a waiver of counsel have failed to consider its standard pragmatically.

Relying upon language in Von Moltke that a judge's inquiry regarding waiver of counsel must be comprehensive and probing, the court below rejected petitioner's assertion that a literal application of the Von Moltke litany constituted a new rule of constitutional law of which retroactive application was barred under Teague v. Lane, 489 U.S. 288 (1989) (App. 15 n.5). As the above discussion demonstrates, the Eighth Circuit's application of Von Moltke runs afoul of Teague. See Butler v. McKellar, 494 U.S. 407, 415 (1990).

The Court should intervene to resolve this conflict among the federal courts of appeals. In some jurisdictions, the waiver of counsel is reviewed for its knowing and voluntary nature by reviewing all the circumstances. In other jurisdictions, the waiver is reviewed against a rigid checklist. The former approach is superior not because it has been adopted in more circuits, but because it should provide more accurate resolution of the question whether the defendant is aware of the dangers and disadvantages of self-representation. Under the totality of the circumstances, respondent's waiver of counsel was valid. The Court should review the issue and resolve the conflict so that trial and appellate courts can properly decide and review the knowing and intelligent waiver of counsel.

II. The court below decided a question of constitutional law in a way that conflicts with this Court's decisions in McCarthy v. United States, 394 U.S. 459 (1969) and United States v. Broce, 488 U.S. 563 (1989), in that the court below held that the

determination of a guilty plea's validity requires the procedural exactitude delineated in Von Moltke v. Gillies, 332 U.S. 708 (1948) (plurality), rather than examining the totality of the circumstances.

The court below's decision requires courts accepting guilty pleas to complete a checklist of issues to discuss with a defendant. Items on the checklist include a discussion about potential defenses, a requirement rejected by this Court in United States v. Broce, 488 U.S. 563, 573 (1989), and lesser included offenses, a requirement rejected in McCarthy v. United States, 394 U.S. 459, 467 n.20 (1969). The decision of the court below involves an important federal question that was decided in a way that conflicts with relevant decisions of this Court.

A defendant must enter his guilty plea knowingly, intelligently, and voluntarily. This basic requirement does not, however, include corollary requirements forcing the trial court to discuss defenses, real or hypothetical, to the charge. If the federal constitution does contain such a requirement, then it is not manifested in Fed. R. Crim. P. 11 or, at least, Missouri's counterpart to that Rule, Mo. S.Ct. R. 24.02. See Griffin v. State, 684 S.W.2d 425, 427 (Mo. App. 1984). The sufficiency of Federal Rule 11 and its state counterpart is a compelling reason to review this case. Given the role of guilty pleas in the criminal justice system, courts accepting guilty pleas need to know what must be done to assure that such a plea is knowing and intelligent.

The court below found that "Wilkins' guilty plea and waiver of presenting mitigating evidence were not valid for essentially the same reasons that lead us to

conclude that his waiver of counsel was not valid." (App. 21). Specifically, the court of appeals found that the state court had not expressly addressed three items on its now-rigid checklist: (1) possible defenses such as diminished capacity; (2) all possible lesser included offenses; and (3) the full range of potential sentences[8] (App. 21-22). The Eighth Circuit's standard for entering a knowing and intelligent guilty plea elevates what is constitutionally mandated to a new, unexplored level.[9]

Without doubt, "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." Brady v. United States, 397 U.S. 742, 748 (1970) (footnote omitted). The Eighth Circuit's rule departs from this Court's holdings. This Court has not held that a "conscious waiver is necessary with respect to each potential defense relinquished by a plea of guilty." Broce, 488 U.S. at 573; see also Libretti v. United States, 516 U.S. 29, 49-50 (1995) (declining to expand the requisite colloquy under Fed. R. Crim. P. 11 to include advice that a guilty plea waives the right to a jury determination of forfeitability under Rule 31(e)); cf. Brady, 397 U.S. at 757 ("A defendant is not entitled to withdraw his plea merely because he discovers long

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[8]Under Missouri law, the only available sentences upon a conviction for first-degree murder is death or life without eligibility of probation or parole. Mo. Rev. Stat. § 565.020.2.

[9]Contrary to Caspari v. Bohlen, 510 U.S. 383, 389 (1994), the court below did not address the Teague nonretroactivity principle raised in the State's Eighth Circuit brief (see App. 20-22; Brief of Appellant, p.30).

after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action.").

Nor has this Court held that a defendant's guilty plea, to constitute "an intentional relinquishment or abandonment of a known right or privilege," Johnson v. Zerbst, 304 U.S. 458, 464 (1938), requires the admonishment of the defendant about lesser included offenses. To the contrary, in the context of considering the required procedure under Rule 11 of the Federal Rules of Criminal Procedure, this Court commented that

> where the charge encompasses lesser included offenses, personally addressing the defendant as to his understanding of the essential elements of the charge to which he pleads guilty would seem a necessary prerequisite to a determination that he understands the meaning of the charge. . . .

McCarthy, 394 U.S. at 467 n.20. Thus for purposes of entering a valid plea under Fed. R. Crim. P. 11, it appears sufficient that a court apprise the defendant of the crime's elements.

Respondent pled guilty under Mo. S.Ct. R. 24.02, a rule designed to ensure a guilty plea is knowing and intelligent. State v. Taylor, 929 S.W.2d 209, 216 (Mo. banc 1996), cert. denied, 117 S.Ct. 1088 (1997). Rule 24.02(b) of the Missouri Supreme Court Rules and Rule 11(c) of the Federal Rules of Criminal Procedure identically provide that

> the court must address the defendant personally in open court, and inform him of, and determine that he understands the following:
>
> 1. The nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law . . . .

Mo. S.Ct. R. 24.02(b); see Fed. R. Crim. P. 11(c). Procedures such as Federal Rule 11 have not been held constitutionally-mandated. McCarthy, 394 U.S. at 465. That Rule is but one of many ways a trial court has to ensure a plea is proper. Under the holding of the court below, however, a guilty plea is constitutionally invalid though the defendant is advised of the nature of the charge and consequences of the plea -- absent a demonstrated "apprehension of the nature of the charges, the statutory offenses included with them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter" pursuant to Von Moltke, 332 U.S. at 724.

In light of McCarthy, 394 U.S. at 465, and Broce, 488 U.S. at 573, the court of appeals' decision conflicts with this Court's decisions and renders Fed. R. Crim. P. 11(c) and its state counterpart insufficient to protect a criminal defendant's constitutional rights. The Court should intervene and resolve this area of the law that is now rendered uncertain. The Court should provide guidance for courts that must determine whether a plea of guilty is knowing and intelligent.

Conclusion

WHEREFORE, Superintendent Bowersox prays the Court for its order issuing a writ of certiorari and reversing the judgment of the court below.

Respectfully submitted,

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